No. 87-1372

In the Supreme Court of the United States

OCTOBER TERM, 1987

ARGENTINE REPUBLIC,

Petitioner,

v.

AMERADA HESS SHIPPING CORPORATION and UNITED CARRIERS, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION AND BRIEF OF THE AMERICAN INSTITUTE OF MARINE UNDERWRITERS AS *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENTS

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Statement of Interest of the American Institute of Marine Underwriters and Motion for Leave to Intervene as *Amicus Curiae* in Support of the Respondents.

The American Institute of Marine Underwriters (AIMU) hereby requests permission to file a brief *amicus curiae* in the above matter. Consent of all parties has been duly requested. Respondents have consented to the filing of this brief. Counsel for the petitioner has referred the matter to the Argentine Foreign Ministry but no response has been received.

AIMU is a national trade association of over 110 insurance companies, each of which is authorized to engage in the business of marine insurance in one or more states of the United States. Issues of extreme importance to AIMU and its member companies are presented in this case. AIMU's membership underwrites approximately 90% of the marine insurance written in the United States. The insurance covers vessels and cargoes engaged in worldwide

commerce and losses that may occur anywhere in the world.

In filing this brief *amicus curiae*, AIMU is acting in support of the American marine insurance community as well as all maritime interests engaged in U.S. domestic or foreign trade. The United States has a vital interest in the protection of neutral shipping on the high seas. Today, only a small percentage of the ocean-borne foreign trade of the United States is carried on U.S.-flag ships. U.S. commerce relies heavily on foreign-flag vessels such as the HERCULES.

A neutral shipowner engaged in U.S. domestic trade must not be denied the right to adjudicate his claim in American courts. Any narrowing of the admiralty jurisdiction of U.S. courts would have a deleterious effect upon the marine war-risk and other marine insurance markets. Costs and availability would be adversely affected.

AIMU respectfully prays that this honorable Court accept its brief *amicus curiae*.

Respectfully submitted,

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Summary of Argument

Argentina's illegal actions in bombing the HERCULES on the high seas without provocation or warning, failing to provide a forum to adjudicate the rights of the owner and charterer of the vessel, and refusing to make restitution for the losses resulting from its actions violate the "Law of Nations" so as to confer jurisdiction under the Alien Tort Statute, 28 U.S.C. §1350. Argentina's actions, which also violate several international agreements to which Argentina and the United States subscribe, preclude immunity under the Foreign Sovereign Immunities Act, 28 U.S.C. §1602, *et seq*. The United States of America has a strong interest in providing a forum to adjudicate the rights of a neutral shipowner engaged in U.S. domestic trade. Maritime interests in the U.S. would be adversely affected by any narrowing of U.S. admiralty jurisdiction.

ARGUMENT

I.

The illegal bombing by Argentina of a neutral vessel on the high seas violates the "Law of Nations" so as to confer jurisdiction under the Alien Tort Statute, 28 U.S.C. §1350.

The Alien Tort Statute gives the distri t courts original jurisdiction for suits by aliens for torts committed in violation of the "Law of Nations" or a treaty of the United States, 28 U.S.C. §1350. The plain language of the statute provides that if an alien sues solely for a tort committed in violation of the "Law of Nations," the district courts have jurisdiction to hear the case. "Once a tort can be considered to be in violation of the law of nations, §1350 allows immediate access to a Federal Court." *Valanga v. Metropolitan Life Insurance Company*, 259 F.Supp. 324, 328 (E.D. Pa. 1966).

Whether considered by eighteenth-century or modern-day standards, the unprovoked attack without warning upon an innocent, neutral merchant vessel on the high seas without compensation violates the "Law of Nations." The Alien Tort Statute was enacted as part of the Judiciary Act of 1789, Ch. 20, 1 Stat. 73, 77. The term "Law of Nations" was employed elsewhere in eighteenth-century legislation as well as in the U.S. Constitution. *See*, 28 U.S.C. §1251(a)(2) (original jurisdiction over actions against ambassadors "not inconsistent with the law of nations"); 18 U.S.C. §1651 (punishment for those who commit "the crime of piracy on the high seas as defined by the law of nations. . . . "); and Art. I, §8, Cl. 10 of the U.S. Constitution (Congress has the power "[t]o define and punish Piracies and Felonies committed on the high seas, and offenses against the Law of Nations"). These enactments are reflective of the generally accepted view in 1789 that the "Law of Nations" included three primary offenses: "'1.

Violation of safe-conducts; 2. Infringement of the rights of embassadors; and 3. Piracy.'" *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 813 (D.C. Cir. 1984) quoting 4 W. Blackstone, *Commentaries*, 68, 72. Violation of safe conduct is the forerunner of the modern-day notion of neutrality. Violations of safe conduct occurring at sea were decided by the admiralty courts. 4 W. Blackstone, *Commentaries*, 69.

Leading eighteenth-century legal experts, including Wilson and Blackstone, confirm that the "Law of Nations" encompassed admiralty or the law maritime. *See, The Federal Courts' Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, 18 Conn. Law Review 467, 505. The notes of Oliver Ellsworth in drafting the Alien Tort Statute show that the courts were to have jurisdiction over seizures of vessels on the high seas in violation of the "Law of Nations." (J.A. 112).[1] The early decisions recognizing and enforcing the "Law of Nations" under Section 1350 primarily relate to maritime matters. *See, Lopes v. Reederei Richard Schroder*, 225 F. Supp. 292, 296 (E.D. Pa. 1963). Indeed, virtually every early case involving the Alien Tort Statute related to a violation of safe conduct or the law of capture concerning neutrals at sea. *See, e.g., Jansen v. The Vrow Christina Magdalena*, 13 F. Cas. 356, 358 (D.C.S.C. 1794) (No. 7,216), *aff'd sub. nom., Talbot v. Jansen*, 3 U.S. (3 Dall.) 133 (1795); *Bolchos v. Darrell*, 3 F. Cas. 810 (D.C.S.C. 1795) (No. 1,607); *Martins v. Ballard*, 16 F. Cas. 923, 924 (D.C.S.C. 1794) (No. 9,175); *Moxon v. The Fanny*, 17 F. Cas. 942, 947-948 (D. Pa. 1793) (No. 9,895). There is no doubt that the "Law of Nations" pertains to violations of the law of war. *In re Yamashita*, 327 U.S. 1, 7 (1946).

The court below found that the uncompensated attack upon an innocent merchant vessel on the high seas was tantamount to piracy. *Amerada Hess Shipping Corp. v. Argentine Republic*, 830 F.2d 421, 424 (2d Cir. 1987). (Pet.

[1] Respondents' Joint Appendix.

App. 1a-21a).[2] That decision is consistent with eighteenth-century legal practice and case law which held violations of the rights of neutral vessels on the high seas contrary to the "Law of Nations."

Courts have held that, in the context of Section 1350, a violation of the "Law of Nations" means a violation of those standards, rules or customs which affect the relationship between states or between an individual and a foreign state and which are used by those states for their common good and/or in dealings *inter se*. *Lopes, supra,* at page 297. *See also, IIT v. Vencap Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975).

International law clearly recognizes the right of innocent passage, both through the territorial sea and on the high seas. *See, Khedivial Line, S.A.E. v. Seafarers' International Union*, 278 F.2d 49, 52 (2d Cir. 1960). This principle of law is of the utmost importance to all maritime nations. International instruments and agreements protecting the rights of neutrals at sea date as far back as the Declaration of Paris in 1856 (A. 253).[3] The Hague Convention of 1907 specifically requires belligerents to respect the rights of neutrals in neutral waters and to abstain from any act which would constitute a violation of neutrality. The bombing of an unarmed, neutral merchant ship on the high seas without provocation or warning is also a violation of the London Naval Conference of 1909 (A. 269) and of the Pan American Convention Relating to Maritime Neutrality of 1928 (A. 292). Argentina is a signatory to both the Hague and Pan American Conventions. The bombing of the HERCULES occurred in waters protected from hostile acts by the Declaration of Panama of 1939 (A. 313). International law protects the rights of neutral vessels on the high seas. An attack on an unarmed merchant ship on the high seas by a belligerent violates

[2] Petitioner's Appendix.

[3] Respondents' Appendix in the Second Circuit.

the standards of conduct to which nations universally adhere.

The Law of the Sea Convention (A. 327) and the Geneva Convention on the High Seas of 1958 (A. 317) both require that neutral vessels be compensated for any loss or damage sustained for violations of these standards. Argentina has signed both Conventions. Not only has Argentina violated the "Law of Nations" by attacking a neutral vessel, it has refused to provide a forum to adjudicate the rights of respondents and refused to make restitution for the loss of the ship and other property. This disregard for international standards of conduct is virtually unprecedented in modern times.

Clearly, this controversy meets the generally settled test for application of the Alien Tort Statute. Plaintiffs are aliens and intentional destruction of a ship sounds in tort. The dispute implicates several treaties and a body of customary international law. *See, Trans-Continental Investment Corporation, S.A. v. Bank of the Commonwealth*, 500 F. Supp. 565, 570 (C.D. Ca. 1980). The wrongs complained of, the bombing of an innocent merchant vessel and the denial of a forum for review, are of mutual concern to the nations of the world expressed in several international conventions. The conduct of Argentina so offends universally accepted principles of civilized conduct that it violates the "Law of Nations." Argentina's illegal bombing of the HERCULES is a violation of international law within the meaning of the Alien Tort Statute.

The greater the degree of codification or consensus concerning an area of international law, the more appropriate it is for our courts to render decisions regarding it. *See, Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964). International law is a part of the law of our land. *The Paquete Habana*, 175 U.S. 677, 700 (1900). The right of innocent passage on the high seas is so well codified internationally and is so universally accepted by civilized

nations that U.S. courts can render decisions regarding the rights of neutral vessels. The Alien Tort Statute opens the federal courts for adjudication of the rights of alien shipowners when such rights are clearly recognized by international law. *See, Filartiga v. Pena-Irala*, 630 F.2d 876, 887 (2d Cir. 1980). The Alien Tort Statute means what it says. "[T]he starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). The district courts have original jurisdiction over suits by aliens for torts committed in violation of the "Law of Nations."

II.

Argentina should be denied immunity under the Foreign Sovereign Immunities Act, 28 U.S.C. §1602, *et seq.* and the Alien Tort Statute, 28 U.S.C. §1350, for the illegal bombing of a neutral vessel on the high seas and for refusal to make restitution.

The primary purpose in enacting the Foreign Sovereign Immunities Act, 28 U.S.C. 1602, *et seq.*, Pub. L. 94-583, 90 Stat. 2892, 1976, "was to depoliticize sovereign immunity decisions by transferring them from the Executive to the Judicial Branch of government, thereby assuring litigants that such decisions would be made on legal rather than political grounds." *National Airmotive v. Iran*, 499 F. Supp. 401 (D.C. D.C. 1980). Political expediency should not play a role in the decision. In the past, the U.S. Department of State has taken the position that the Alien Tort Statute would provide jurisdiction over a foreign sovereign for an attack on a neutral vessel.

> "Indeed, it has long been established that in certain situations, individuals may sue to enforce their rights under international law. *For example when a ship is seized on the high seas in violation of international law, the owner of the ship may sue to recover the ship as well as seek damages.*" Memorandum for the United States as *Amicus Curiae*, in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) reprinted in 19 I.L.M. 582, 602 (1980). (Emphasis added.)

Now the Department argues, improperly, in favor of immunity for political reasons.

Argentina is not entitled to immunity and should be held accountable for its attack on a neutral merchant vessel in contravention of international law. There are several grounds for the denial of immunity under the Foreign Sovereign Immunities Act. Each one alone would be sufficient to bar immunity for Argentina in this matter. Together they constitute an overwhelming case for the exercise of jurisdiction by U.S. courts over the Republic of Argentina in this matter.

A. The Foreign Sovereign Immunities Act was enacted subject to existing international agreements of the United States.

The Foreign Sovereign Immunities Act provides for the immunity of a foreign state "subject to existing international agreements to which the United States is a party at the time of enactment of this Act." 28 U.S.C. §1604. In 1976, when the Foreign Sovereign Immunities Act was enacted, the United States was party to the Geneva Convention on the High Seas and the Pan American Convention Relating to Maritime Neutrality of 1928. Both treaties protect the right of innocent passage of neutral merchant vessels on the high seas and provide for the payment of restitution in the event of any interference with that right. The Republic of Argentina also has signed both these treaties. Argentina's actions in bombing

a neutral merchant ship on the high seas violate the right of innocent passage. Interference with this internationally recognized right and Argentina's subsequent refusal to make reparations violate international agreements to which the United States is a party. Because these agreements predate the enactment of the Foreign Sovereign Immunities Act, immunity may not be granted to Argentina.

B. Argentina has waived any right to sovereign immunity by violating international treaties to which it subscribes.

Section 1605(a)(1) of the Foreign Sovereign Immunities Act provides that a foreign state will not be immune in any case in which that state has waived its immunity, either explicitly or implicitly. Argentina is a signatory to the Geneva Convention and the Pan American Convention which protect the right of innocent passage. Shortly after the attack on the HERCULES, Argentina also signed the Law of the Sea Convention of 1982, which also sets out the rights of neutral merchant vessels and mandates compensation for violation. By explicitly agreeing to be bound by the terms of these international agreements regarding the fundamental principle of the right of innocent passage of a neutral vessel on the high seas, Argentina has waived any right it might have had to claim sovereign immunity. Through its illegal actions in bombing the HERCULES and refusing to make restitution thereafter, Argentina has forfeited any claim it may have had to the shield of immunity. *Von Dardel v. Union of Soviet Socialist Republics*, 623 F. Supp. 246 (D.C. D.C. 1985); 28 U.S.C. §1605(a)(1).

C. The Foreign Sovereign Immunities Act must be interpreted in a manner consistent with international law.

The destruction of a neutral vessel on the high seas without provocation violates well-codified principles of international law. Argentina's action violates the standards of international conduct and thereby the United States common law (*supra*, p. 7-8). "[F]oreign sovereign

immunity is a matter of grace and comity on the part of the United States. . . . " *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983). There is no justification for granting foreign sovereign immunity to a country which has violated its own international agreements and departed from standard international conduct in refusing to make restitution. "Neutral trade is entitled to protection in all Courts." *The Bermuda*, 70 U.S. 514, 551 (1865). Argentina is not entitled to immunity.

> "Since the sinking of a neutral vessel on the high seas without justification violates a substantive principle of international law, no matter who does the sinking, there is no immunity under international law in this case." *Amerada Hess Shipping Corp. v. Argentine Republic. Supra*, at p. 5.

There is no other forum in which Liberian plaintiffs in this matter can obtain justice. The only place that the owner and charterer of this neutral vessel can seek redress is in U.S. courts. An "act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains, and consequently, can never be construed to violate neutral rights. . . . " *The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.). It would be inconsistent with international law to interpret the Foreign Sovereign Immunities Act in a matter which does not uphold the rights of neutral shipping.

D. Congress did not intend to repeal the Alien Tort Statute when it enacted the Foreign Sovereign Immunities Act.

At the time of enactment of the Alien Tort Statute, a sovereign could not violate the "Law of Nations" on the high seas with impunity. As a general rule, there was no blanket immunity for foreign states. *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812). The

Alien Tort Statute was conceived as a vehicle to protect the rights of neutral vessels against aggression by belligerents. (See discussion, *supra*, p. 4-5). Foreign sovereigns were only entitled to immunity if they acted within international law. Foreign ships of war may receive immunity, as a matter of comity, only if they demean themselves according to the law. *The Santissima Trinidad*, 20 U.S. (7 Wheat.) 283, 352 (1822). A foreign sovereign in violation of the "Law of Nations" is subject to the jurisdiction of U.S. courts. *Id.* at 349, 352-354.

The legislative history of the Foreign Sovereign Immunities Act is silent on the subject of the Alien Tort Statute. As repeal by implication is frowned upon, *Rodriguez v. U.S.*, 480 U.S. 522 (1987), *amicus* submits that Congress did not intend to foreclose access to the federal courts for an alien whose rights to neutrality have been violated on the high seas. *See*, Affidavit of Dr. Ved P. Nanda (J.A. 97, 99). Any other determination would narrow the admiralty jurisdiction of the United States courts and preclude alien plaintiffs whose neutral rights had been violated in contravention of international law from seeking redress in the United States courts as originally intended by the Alien Tort Statute.

E. Under the "tort exception" to the Foreign Sovereign Immunities Act §1605(a)(5), Argentina should be subject to the jurisdiction of U.S. courts.

Section 1605(a)(5) of the Foreign Sovereign Immunities Act provides an additional exception to the application of the Foreign Sovereign Immunities Act. Under the "tort exception," 28 U.S.C. §1605(a)(5), a foreign state may not be accorded immunity for damage to or loss of property occurring in the United States and caused by the tortious act or omission of that foreign state. Section 28 U.S.C. 1603(c) defines the term "United States" for purposes of the Foreign Sovereign Immunities Act to include "all

territory and waters, continental and insular, subject to the jurisdiction of the United States."

The admiralty jurisdiction of U.S. courts extends to the high seas. "Every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance." *The Plymouth*, 70 U.S. (3 Wall.) 20, 36 (1865).[4]

> "Briefly, the admiralty jurisdiction of the United States extends to all waters, salt or fresh, with or without tides, natural or artificial, which are in fact navigable in interstate or foreign water commerce . . . " G. Gilmore and C. Black, *The Law of Admiralty*, 31-32 (2d Ed. 1975).

"Obviously the high seas are included . . . " *id.* at p. 31.

The attack on the HERCULES took place on the high seas. The high seas are waters subject to the jurisdiction of the United States as provided in 28 U.S.C. 1603(c). Accordingly, the bombing took place within waters over which the United States has jurisdiction for purposes of §1605 (a)(5).

The attack caused direct injury to the American economy. (*See, infra*, p. 15). Argentina should not be accorded immunity. The bombing of the HERCULES constituted a tortious attack within the United States for purposes of the Foreign Sovereign Immunities Act. Therefore, Argentina may not be accorded immunity and the complaint of Liberian plaintiffs in this matter should be heard.

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[4] In *Executive Jet Aviation, Inc. v. Cleveland*, 409 U.S. 249 (1972), this definition was modified to require that the wrong bear a significant relationship to traditional maritime activity.

III.

The United States has a strong interest in the outcome of this dispute which warrants a hearing in U.S. courts.

The United States has a vital interest in the protection of neutral shipping on the high seas. Today, only a small percentage of the ocean-borne foreign trade of the United States is carried on U.S.-flag ships. The dependence of the United States on such foreign commerce has increased substantially since World War II. Yet the number of U.S.-flag ships continues to dwindle. U.S. companies have developed foreign-flag fleets under "flags of convenience" from nations such as Liberia and Panama. The dependence of U.S. foreign commerce on such foreign-flag ships is an economic reality of the twentieth century. The U.S. Maritime Administration has taken the position that foreign-flag vessels owned by American interests may be requisitioned in time of war. They are also eligible to participate in the government war-risk insurance program which would go into effect in time of war. 46 C.F.R. §308.1b (1987).

The importance of such foreign-flag vessels to the American economy is exemplified by the employment of the HERCULES (A. 220-223). From the opening of the Trans-Alaska pipeline in 1977 until the destruction of the HERCULES, the vessel was employed by Amerada Hess in the United States domestic trade. The HERCULES carried Alaskan crude oil to the Amerada Hess refinery in the U.S. Virgin Islands. The HERCULES was a foreign-flag vessel trading in domestic, interstate U.S. commerce. Eighty-three percent (83%) of the refined products manufactured from the crude oil carried by the HERCULES was consumed within the continental United States. It has been established that the balance was marketed in the Virgin Islands or purchased directly by the United States government.

See, American Maritime Association v. Blumenthal, 590 F.2d 1156, 1158-1160 (D.C. Cir. 1978).

As a result of Argentina's unprovoked attack on the HERCULES, the owners suffered the loss of a vessel employed in U.S. domestic trade and the loss of U.S. charterhire payable in U.S. dollars in the United States. The charterers lost the use of the vessel in U.S. domestic trade and the bunkers (fuel) on board the vessel which were sold and delivered within the United States before the voyage. The bombing of the HERCULES resulted in direct economic losses in the U.S. economy.

The United States has a vital interest in protecting the rights of neutral vessels on the high seas throughout the world. Most recently, U.S. naval power has actively protected the rights of merchant shipping in the Persian Gulf to keep vital ship lanes open. Since May of 1981 at least 524 vessels had been destroyed or damaged in the Persian Gulf. (*Business Insurance*, May 23, 1988, at 4, col. 1.) Industry analysts have indicated that few of such incidents would result in lawsuits in the United States, P. Loree, *Hercules and the Gulf, Fairplay*, February 11, 1988, at 12, col. 1. The threat to neutral and American shipping remains strong and has a direct effect upon American economic conditions. American courts must continue to provide a forum for the adjudication of rights of American shipowners and of neutral shipowners engaged in U.S. domestic trade if the ocean-borne commerce of the United States is to remain free. This is especially true in this rare case when no other forum is available. *See generally*, Brief of the Republic of Liberia as *Amicus Curiae* in Support of Respondents, at 27-28.

Another important economic factor to be considered is the cost and availability of marine insurance. The market for insuring blue water or ocean-going hulls such as the HERCULES is an international one. A large portion of the war-risk insurance on vessels such as the HERCULES may be placed in the American ocean marine insurance market.

Obviously, losses of the magnitude of the HERCULES affect rates paid by other shipowners.

Traditionally, ocean marine insurers offset substantial losses through "recovery programs" in which the rights of the shipowner (who has been paid for his losses) are subrogated to the underwriter. The insurer then proceeds against the wrongdoer who caused the loss in an attempt to recoup costs paid. Such recovery programs reduce insurance costs. *See*, Winter, *Marine Insurance*, pp. 423-424, 3rd Ed., 1952; Gilmore & Black, *supra*, p. 91-92. If marine insurers anticipate that there will be no forum in which to vindicate the rights of neutral shipowners, the cost and availability of marine war-risk insurance could be seriously affected.

The maritime community, composed of shipowners, charterers, marine underwriters and others, is a complex international industry. Maritime nations are economically interdependent upon one another. It is vital that U.S. courts be available for the protection of maritime commerce in which the U.S. has an interest, including the rights of neutral vessels on the high seas. Traditional admiralty jurisdiction over these matters must not be restricted in any way.

The admiralty jurisdiction of the U.S. courts should not be narrowed as a result of a decision in this matter. The Alien Tort Statute was enacted in the eighteenth century to provide a remedy for aliens whose rights were infringed upon in violation of the "Law of Nations." As originally conceived, the statute was part of admiralty jurisdiction. (*See, supra*, p. 5) Fortunately, in modern times it has not been necessary to utilize the Alien Tort Statute to provide a forum for neutral shipowners to litigate a violation of their rights, because most nations recognize and abide by international agreements. It is imperative that the U.S. district courts remain as a forum wherein the rights of neutral merchant vessels attacked without provocation on the high seas may be adjudicated. This is especially true in the context of this unusual case. Deprived of a potential

remedy, American maritime interests would be unprotected and the original intent of the Judiciary Act of 1789 would be vitiated.

CONCLUSION

It is respectfully submitted that the decision of the lower court is correct and that respondents' claims should be heard.

Respectfully submitted,

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